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September 5, 2019
Via email and U.S. mail

Hon. Karl A. Racine
Attorney General of the District of Columbia
441 4th Street, NW, Suite 1100
Washington, DC 20001

Re: *District of Columbia v. Gregory Johnson*, No. 2019-CDC-008972 (D.C. Superior Court)

Dear Attorney General Racine,

We write to urge you to drop the misdemeanor charges against Gregory (“Joey”) Johnson arising out of his burning of an American Flag on Pennsylvania Avenue in front of the White House on the Fourth of July. The undersigned either represent Mr. Johnson (Mark Goldstone) or are considering entering an appearance on his behalf (Mr. Spitzer).

Mr. Johnson is charged with two misdemeanors: disorderly conduct–inciting violence (D.C. Code § 22-1321(a)(2)), and disorderly conduct–causing unreasonable fear (D.C. Code § 22-1321(a)(1)). It seems plain to us that these charges have no valid basis in fact, and that Mr. Johnson was arrested in retaliation for the lawful—and constitutionally protected—act of burning a flag.

Helpfully, there is a clear videotape of the incident, taken by a journalist. It can be viewed at <https://www.youtube.com/watch?v=eYYtuHONlqQ&feature=youtu.be>.

After an initial incident in which some people wearing Trump regalia violently tried to prevent Mr. Johnson from burning a flag, the Secret Service closed Pennsylvania Avenue and cleared the street except for Mr. Johnson’s group, which had previously announced their plan to burn a flag, and had even filed an Assembly Plan Notification with the MPD (Attachment 1). It appears that, at this point, the Secret Service officers were protecting Mr. Johnson’s ability to engage in his First Amendment activity.

As the flag is lit, no one is in the vicinity of Mr. Johnson’s group except four Uniformed Secret Service officers, all at a safe distance away from the flag (screen shot 1:49). Seeing the flag lit, the bicycle officer on the right moves toward the flag, instead of remaining at a safe distance (screen shot 1:50). Mr. Johnson lifts and dips the flag a couple of times, as the bicycle officer moves even closer and the officer with the fire extinguisher sprints in (for no good reason, as no one is in danger), apparently to interfere with Mr. Johnson’s First Amendment

activity (screen shot 1:51). Mr. Johnson drops the flag as the fire extinguisher begins spraying (screen shots 1:51a; 1:51b). The flag floats toward the bicycle officer, who by now is standing much too close (screen shot 1:52). We assume this officer is the alleged “victim.” The officer backs away (screen shots 1:52a; 1:53), but then immediately moves back in to stamp out the flag (screen shot 1:53a). He then stands calmly in the smoke for a moment, showing no sign of distress (screen shot 1:58). According to the narrator, officers then asked “who lit the flag” (video at 2:30), and then proceeded to arrest Mr. Johnson.

No valid criminal charges can be based on this conduct. As far as we can tell, there is no federal or District of Columbia criminal law that makes it an offense to burn something on Pennsylvania Avenue during daylight hours. Mr. Johnson’s expressive conduct—which, as the video shows, was entirely peaceful and non-threatening—was therefore protected by the First Amendment.

Mr. Johnson did not “[i]ncite or provoke violence where there is a likelihood that such violence will ensue,” D.C. Code § 22-1321(a)(2), because the Secret Service had cleared the street of those who might have engaged in violence. In any event, a person peacefully exercising First Amendment rights cannot be convicted of inciting violence based on the unlawful conduct of those who would violently prevent the exercise of those rights; otherwise all controversial free speech activity would bear the risk of criminal conviction at the option of its opponents. As the Supreme Court has explained, “Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.” *Brown v. Louisiana*, 383 U.S. 1, 133 n.1 (1966); *see also Texas v. Johnson*, 491 U.S. 397, 408-09 (1989) (the government cannot presume that flag-burning will provoke violence).

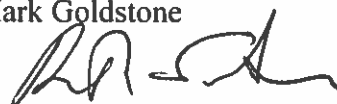
Nor will the evidence support a conviction for “[i]ntentionally or recklessly act[ing] in such a manner as to cause another person to be in reasonable fear that a person or property in a person’s immediate possession is likely to be harmed or taken.” D.C. Code § 22-1321(a)(1). According to the Gerstein Affidavit, an Officer Wendt “was hit by [Mr. Johnson] with an American flag engulfed in open flames that was covered in an accelerant that emitted a large cloud of a yellow powdery substance [Officer Wendt] began coughing and choking from the substance that he inhaled.” (Attachment 2.) But as the video clearly shows, Mr. Johnson simply let go of the burning flag; Officer Wendt had moved too close—for no justifiable reason—and if he was momentarily touched by the flag it was by his own negligence or recklessness. Mr. Johnson did not “intentionally or recklessly” act to harm him or put him in fear. If a man puts his hand on the barbeque grill next to the hamburger, it is not the cook’s fault if his hand gets burned.

There is no justifiable basis for this prosecution. For the reasons given above, we urge you to dismiss the charges.

Respectfully,



Mark Goldstone



Arthur B. Spitzer

cc: Peter Saba, OAG

Assembly Plan Notification/ Application for Approval of Assembly Plan

Metropolitan Police Department
Washington, DC

Assembly
 Picket

Mail to: Metropolitan Police Department
Special Operations Division
2850 New York Avenue, NE
Washington, DC 20002

Email to: sod.events@dc.gov



Date Application Submitted: 7/3/2019 Date of Event: 7/4/2019

Purpose:

Gregory L "Joey" Johnson, defendant in SCOTUS Texas v. Johnson 1989 will burn a U.S. flag in a lawful way, as a protest of Trump's Salute to America, and expression of imagining a world without America.

Location: Free speech area 1600 Pennsylvania Avenue, White House

Principal Officer/Person in Charge (If there is a different person in charge of activities at different locations, each person must be listed):

Debra Sweet

Contact Information (include area codes with phone numbers)

Day Phone Number: 718 809 3803 Evening Phone Number: 718 809 3803
Cell Phone Number: Fax Number:
Email Address(es): debra.sweet@gmail.com

Event Information

Name of Group: Revolution Club
Estimated Number of Participants: 50

Assembly Time: 5:00 pm Disbanding Time: 6:00 pm

List any special equipment (props, stages, sound equipment, other structures) that will be used in assembly or rally areas (If additional space is needed, please list on a separate sheet):

2 banners, signs, portable sound system, U.S flags (3'x5' + 2.5'x4')
2 fire extinguishers, 1 galvanized trash can

Any planned civil disobedience: Yes No
(If yes, please indicate the individual/group, number of participants & locations)

Debra Sweet
Signature

7/3/2019
Date



1:49



1:50



1:51



1:51



1:51 6



1:52



1:529



1:53



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1:58

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CCN #: 19116820

Arrest Number: 491921375

GERSTEIN AFFIDAVIT

District of Columbia

VS

JOHNSON, GREGORY LEE

Officer Young, Tyler, CAD# U13653, personally appeared on 07/04/2019 and under penalty for making a false statement, set forth the below statement regarding the named defendant as true and/or as based upon information s/he believes to be true, and that the events occurred in the District of Columbia.

The event occurred on 07/04/2019 at approximately 16:59 at WHITE HOUSE, 1600 PENNSYLVANIA AVENUE NW, WASHINGTON, DC 20500

The events occurred on July 4, 2019 at 16:59 hours at 1600 Pennsylvania Avenue NW.

While in full police uniform riding a marked police bicycle, AO (T. Young #2174), AAO1 (B. Milburn #2178), and AAO2 (W. Wright #1133), responded from the center of Lafayette Park to Pennsylvania Avenue for what appeared to be a crowd of people fighting. Upon arriving to Pennsylvania Avenue we noticed multiple people dressed in black shirts forming a human chain in a circle. AAO3 (M. Wendt #2178) was hit by S1 (Johnson, Gregory-CA-DL # C4888687), with an American flag engulfed in open flames that was covered in an accelerant that emitted a large cloud of a yellow powdery substance. AAO3 began coughing and choking from the substance that he inhaled. AO assisted AAO3 in getting out of the cloud of smoke to a safer location to breathe.

AO, AAO3, and multiple other units began searching the crowd of individuals with black t-shirts for the male who threw the accelerant covered object at AAO3. S1 was identified by AAO3 as the individual who threw the object at him. S1 was placed into handcuffs.

S1 will now be referred to as D1. D1 sustained injuries during the arrest and was transported to George Washington University Hospital.

AAO1 stated that during the arrest of D1, S2 (Scogin, Joseph Edward – CA-DL#DS083764) tried to intervene with the arrest of D1 and pull D1 away from the officers. AO and AAO4 (N. Pogue #134) assisted in the arrest of S2 on the north sidewalk of Pennsylvania Avenue. S2 actively resisted by forcibly moving his arms while AO was attempting to put handcuffs on S2.

S2 will now be referred to as D2.

D2 was transported to MPD 2nd District for processing.

AAO3 and AAO5 (M. Vandenbrock #366) were taken to Sibley Hospital for the accelerant that they had inhaled from the American flag that was engulfed in open flame.

Battalion Chief Kuffman of DC Fire advised that an arson K9 would be brought out to the scene to test the items left to confirm an accelerant was used. DC Fire Department Arson Investigator Kittrell (#FD119) contacted Deputy Chief Fire Marshal John Nelson (#8546) of Maryland State Police to respond with K9 partner "Zorro". At 20:10 hours, K9 Zorro conducted a sweep which resulted in a positive alert to the presence of an ignitable liquid on the flags that were in D1's possession.

D1 was issued permit number 19-1288 by the United States Department of the Interior with multiple restrictions in place. D1 was afforded a secured area with a 30 gallon burn can in which to ignite the flag. D1 ignored the restrictions set in the permit and set the flag on fire in the center of Pennsylvania Avenue NW.

The property of both D1 and D2 was placed on property book 2642 on page 309 at MPDC 2D.

Police Officer

Witness / Assistant Attorney General for the District of Columbia

YOUNG, TYLER / U13653 / U13653

GROOMES, DAVID / U07603

Printed Name / Badge# / CAD#
Deputy Clerk

Printed Name of Witness /

The foregoing statement was made under penalty of criminal prosecution and punishment for false statements pursuant to D.C. Code 22-2405